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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1948

No. 298

DEFENSE SUPPLIES CORPORATION, and RECONSTRUCTION FINANCE CORPORATION,

Petitioners,

vs.

LAWRENCE WAREHOUSE COMPANY, CAPITOL CHEVROLET COMPANY, V. J. McGREW and CLYDE W. HENRY,

Respondents.

BRIEF OF RESPONDENTS, LAWRENCE WAREHOUSE COMPANY AND CAPITOL CHEVROLET COMPANY.

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Subject Index

	Page
Opinion below	1
Jurisdiction	2
Statutory provisions involved	4
Statement of the case	5
Questions presented	9
Argument:	
1. Summary of argument	10
2. Defense Supplies Corporation was a corporation created under an Act of Congress and was by Act of Congress dissolved on July 1, 1945	13
3. Dissolution of a corporation abates a pending action in the absence of statutory authority for its survival	17
4. The effect of the joint resolution of June 30, 1945	19
A. The statutory language	19
B. judicial interpretation of the statute	27
C. contention of petitioners	32
Conclusion	36

Table of Authorities Cited

Cases

	Pages
Atlantic Meat Co. v. R.F.C., 155 Fed. (2d) 533 (U.S. E.C.A., 1946)	24
Bank of the United States v. Planters Bank, 9 Wheaton 904, 6 L. Ed. 244 (1824)	14
Becker Steel Co. of America v. Hicks, 1 Fed. Supp. 300 (D.C. S.D. N.Y., 1932), affd. 66 Fed. (2d) 497 (2d C.C.A., 1933)	30
Black Clawson Co. v. Robertson, 71 Fed. (2d) 536 (C.A. D.C., 1934)	30
Botany Mills v. United States, 278 U. S. 282, 73 L. Ed. 379 (1929)	23
Bowles v. Ohlhausen, 71 Fed. Supp. 199 (D.C., N.D. Ill., E.D. 1947)	15, 30
Cherry Cotton Mills v. United States, 327 U. S. 536, 90 L. Ed. 835 (1946)	16
Chicago T. & T. Co. v. 4136 Wilcox Bldg. Corp., 302 U. S. 120, 82 L. Ed. 147 (1937)	17
Defense Supplies Corp. v. United States Lines Co., 148 F. (2d) 311 (2d C.C.A., 1945)	16
Fix v. Philadelphia Barge Co., 290 U. S. 530, 78 L. Ed. 481 (1934)	19, 33
Fleming v. Mohawk Wrecking & Lumber Co., 331 U. S. 111, 91 L. Ed. 1375 (1947)	16
Gaynor v. Metals Reserve Co., 166 F. (2d) 1011 (8th C.C.A., 1948)	18, 28, 32, 33, 35, 36
Heald v. District of Columbia, 254 U. S. 20, 65 L. Ed. 106 (1920)	31
John Barton Payne v. Industrial Board of Illinois, 258 U. S. 613, 66 L. Ed. 790 (1922)	30
Johnson v. Manhattan Railroad Company, 289 U. S. 479, 77 L. Ed. 1331 (1933)	30

Page

Keffer & Keifer v. R.F.C., 306 U. S. 381, 83 L. Ed. 784 (1939) 14

Kuttroff v. Sutherland, 49 Fed. (2d) 944 (D.C.S.D.N.Y., 1931), affd. 66 Fed. (2d) 500 (2d C.C.A., 1933) 30

LeCrone v. McAdoo, 253 U. S. 217, 64 L. Ed. 869 (1920) .. 30

McCaughn v. Hershey Chocolate Company, 283 U. S. 488, 75 L. Ed. 1183 (1931) 31

Martin v. Coe, 83 Fed. (2d) 606 (U.S.C.A.D.C., 1936) 30

Mitchell v. Overman, 103 U. S. 62, 26 L. Ed. 369 (1881) .. 18

National Bank v. Colby, 21 Wall. 609, 22 L. Ed. 687 (1874) 17

Oklahoma Natural Gas Co. v. Oklahoma, 273 U. S. 257, 71 L. Ed. 634 (1927) 17, 34

Old Colony R. Co. v. Commissioner of Internal Revenue, 284 U. S. 552, 76 L. Ed. 484 (1932) 31

Pasco Robles Mercantile Co. v. Com. Internal Revenue, 33 Fed. (2d) 653 (9th C.C.A., 1929) 23

R.F.C. v. County of Beaver, 328 U. S. 204, 90 L. Ed. 1172 (1946) 24

R.F.C. v. J. G. Menihan Corp., 312 U. S. 81, 85 L. Ed. 595 (1941) 14

Raleigh & G. R. Co. v. Reid, 13 Wall. 269, 20 L. Ed. 570 (1872) 23

Sloan Shipyards Corp. v. U. S. Shipping Board E. F. Corp., 258 U. S. 549, 66 L. Ed. 762 (1922) 14

Southern Pacific Co. v. R. F. C., 161 F. (2d) 56 (9th C.C.A., 1947) 16

The Kongo, 155 Fed. (2d) 492 (6th C.C.A., 1946) 24

U. S. ex rel. Claussen v. Curran, 276 U. S. 590, 72 L. Ed. 720 (1928) 30

Walling v. Reuter, 321 U. S. 671, 88 L. Ed. 1001 (1944) 18

Statutes

Page

Act of Congress (Act of January 22, 1932, Chapter VIII, 47 Stat. at Large, page 5) 19

Joint Resolution of June 30, 1945, c. 215, 59 Stat. 310..... 4

28 U.S.C., Section 780 30
28 U.S.C.A., Section 1254 2

Texts

47 C. J., Section 16, page 18 26

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BRIEF OF RESPONDENTS, LAWRENCE WAREHOUSE COMPANY AND CAPITOL CHEVROLET COMPANY.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Ninth Circuit (R. 396-425) is reported at 168 F. 2d 199. Earlier opinions of the Court of Appeals (R. 370-380) and of the United States District Court for the Northern District of California (R. 63-75) not

concerned with the issues now before the Court are reported at 164 F. 2d 773 and 67 F. Supp. 16, respectively.

JURISDICTION.

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on April 6, 1948 (R. 426-427). A petition for rehearing was denied on May 13, 1948 (R. 428). On August 12, 1948, the time to petition for certiorari was extended to October 1, 1948, by the Chief Justice (R. 430). The petition for writ of certiorari was filed on September 24, 1948, and granted on November 8, 1948.

The petitioners assert that jurisdiction of this Court rests upon 28 U.S.C.A. 1254, which said section provides for jurisdiction:

> "(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case before or after rendition of judgment or decree;"

In the Court of Appeals below and here respondents have asserted a lack of jurisdiction for the reason that DSC, named below as a party plaintiff and as one of the petitioners in this matter, ceased to exist on July 1, 1945, and that RFC, the other named petitioner, is not now and never has been a party to this action. Application for a writ of certiorari was not, therefore, granted upon the petition of a "party to a civil action", since one named petitioner was not in existence and the other named petitioner was a stranger to the action.

Furthermore, the time for filing a petition for certiorari had expired since the judgment of the Court of Appeals was rendered April 6, 1948 and the petition for certiorari was not filed until September 24, 1948. Ordinarily a petition for rehearing in the Court of Appeals extends the time for applying for certiorari. But, here, the order of the Court of Appeals was that the Defense Supplies Corporation was non-existent, and therefore that the action brought in its name had to be vacated. The motion to substitute RFC into the case to correct a "formal defect" of the parties was not granted. Hence, the attorneys acting in the name of DSC were put on notice that the purported corporation for which they were acting was dissolved and that they, in effect, had no authority to act for that defunct corporation. In the light of this situation, there was no power on their part to apply for a rehearing for a corporation that they then knew was defunct, and that the Court had ruled was defunct, and the alleged petition for rehearing was a nullity. Therefore, the time to apply for certiorari dated from April 6, 1948 and not from the date of the denial of the petition for rehearing on May 13, 1948. We do not know whether these facts were presented to this Court in the application for extension of time to petition this Court for certiorari, but in any event the petition for certiorari, as governed by statute, came too late in this case, in view of the defunct nature of the corporation.

The respondents, therefore, assert that this Court is without jurisdiction and respectfully petition that the writ be dismissed for lack of jurisdiction.

STATUTORY PROVISIONS INVOLVED.

The Joint Resolution of June 30, 1945, c. 215, 59 Stat. 310, reads as follows:

> That, notwithstanding any other provision of law, all functions, powers, duties, and authority of the corporations hereinafter designated, are hereby transferred, together with all their documents, books of account, records, assets, and liabilities of every kind and nature, to Reconstruction Finance Corporation and shall be performed, exercised, and administered by that Corporation in the same manner and to the same extent and effect as if originally vested in Reconstruction Finance Corporation, and the designated corporations are hereby dissolved: Defense Plant Corporation, Metals Reserve Company, Rubber Reserve Company, and Defense Supplies Corporation, created by Reconstruction Finance Corporation pursuant to the Act of June 25, 1940 (54 Stat. 572), and Disaster Loan Corporation, created by the Act of February 11, 1937 (50 Stat. 19), are hereby designated as the corporations to which this joint resolution applies.
>
> Sec. 2. The Reconstruction Finance Corporation shall assume and be subject to all liabilities, whether arising out of contract or otherwise, of the corporations dissolved by this joint resolution. No suit, action, or other proceeding lawfully commenced by or against any of such corporations shall abate by reason of the enactment of this joint resolution, but the court, on motion or supplemental petition filed at any time within twelve months after the date of such enactment, showing a necessity for the survival of such suit, action, or other proceeding to obtain a determina-

tion of the questions involved, may allow the same to be maintained by or against the Reconstruction Finance Corporation.

Sec. 3. This joint resolution shall take effect on July 1, 1945.

STATEMENT OF THE CASE.

Petitioners' statement of facts is in the main correct, but throughout the Brief Petitioners assert a serious mis-statement of fact upon which a large portion of their argument is based. In view of the importance of the chronological history in this matter, we set it forth below in tabular form.

1944	
February 16th	Complaint filed
1945	
February 13th, 14th and 15th	Submission of evidence and oral argument
July 1st	*Date of dissolution of Defense Supplies Corporation*
July 2nd	Closing brief filed in the name of Defense Supplies Corporation
July 16th	Order of submission filed and entered
1946	
January 9th	Court ordered judgment for plaintiff
February 20th	Court ordered findings prepared
March 22nd	Proposed judgment and findings lodged
March 29th	Proposed additional findings lodged
April 3rd	Findings settled
April 15th	Judgment filed and entered
April 29th	Motion for new trial denied

June 14th	Notice of appeal of Lawrence Warehouse Company served and filed
June 19th	Notice of appeal of Defense Supplies Corporation filed
June 30th	*Last day for Reconstruction Finance Corporation to move for substitution*
July 11th	Notice of appeal of Capitol Chevrolet Company filed
1947	
October 14th	Appeals of Defense Supplies Corporation, Lawrence Warehouse Company and Capitol Chevrolet Company argued in Court of Appeals
December 5th	Decision and judgment of Court of Appeals
1948	
January 2nd	Petitions for rehearing denied
February 17th	Motions in Court of Appeals to vacate its decision, reconsider the matter and remand it to the District Court with instructions to dismiss
March 2nd	Motion filed in the name of Defense Supplies Corporation and Reconstruction Finance Corporation for an order amending the pleadings by substituting Reconstruction Finance Corporation as plaintiff
April 6th	Opinion and Decision of the Court of Appeals denying motion for order amending the pleadings; granting respondents' motion, vacating the decision and remanding the case to the District Court for dismissal
May 13th	Petitions for rehearing denied and opinion amended

It is to be noted that petitioner Defense Supplies Corporation has had no existence since July 1, 1945

and that the petitioner Reconstruction Finance Corporation is not now, and never has been, a party to the action and has never moved for substitution or intervention herein except by "Motion to Amend the Pleadings" which said motion was denied on April 6, 1948.

It is also to be noted that Defense Supplies Corporation, the sole party plaintiff in the action below, was dissolved some time prior to the submission of the cause by the District Court and long prior to entry of judgment. Petitioners have assumed throughout their brief that the trial had been completed prior to the dissolution of DSC and have based a considerable portion of their argument upon that misconception. For example, on page 3 of the brief, under the title "Questions Presented", the petitioners assert:

> "An action instituted by Defense Supplies Corporation was fully tried and argued prior to July 1, 1945."

On page 5 of the brief:

> "After hearing argument the court on February 15, 1945, ordered that the motions to dismiss and the cause be submitted for consideration and decision on memoranda to be subsequently filed and that the case be continued to May 1, 1945, for submission."

On page 9 of the brief:

> "The trial of the action had been completed before the enactment of the joint resolution. The judgment of the district court was rendered before the expiration of the twelve month period."

On page 11:

"The judgment was rendered by the district court when DSC was still in existence * * *"

On page 13:

"Thus the trial of the action was concluded several months before the joint resolution was enacted."

On page 34:

"The judgment was rendered by the district court when DSC was still alive and should be upheld as valid notwithstanding the subsequent expiration of powers."

Again on the same page:

"It has been shown that the case had been fully tried and argued before the enactment of the joint resolution providing for the dissolution of DSC."

At the bottom of that page:

"This judgment was rendered by the District Court when there can be no question that the DSC was still alive and, therefore, no question of its validity at the time of entry."

The effect of such statements and the reliance placed by the petitioners thereon is indicated by their statement on page 38 of the brief in which they state:

"But whether or not the circumstances are deemed to constitute a waiver, *it is clear that the subsequent dissolution of DSC did not render the prior judgment invalid.*" (Emphasis ours.)

The fact of the matter is that the concluding brief filed in the name of the DSC was not filed until July 2, 1945, one day after the dissolution of the DSC. The cause was not submitted to the District Court until July 16, 1945, that is to say, sixteen days after the dissolution of the DSC and the judgment of the District Court was not entered until April 15, 1946, approximately 9½ months after DSC had been dissolved. Thus the trial concluded 9½ months *after* the dissolution of DSC by the Joint Resolution of June 30, 1945 rather than several months *before* the dissolution as petitioners assert. (Brief p. 13.)

There was no judgment rendered prior to the dissolution of DSC. There was no judgment while DSC was in existence.

QUESTIONS INVOLVED.

1. Whether a corporation created by Act of Congress, such as Defense Supplies Corporation, ceases to exist when it is abolished by an Act of Congress.

2. Whether a new corporation, RFC, to which all the assets and liabilities of a dissolved corporation are transferred, has to assert its rights in the particular case pending in the mode and manner provided by Congress and in the time, to-wit, twelve months, specified by Congress.

3. Whether the District Court had jurisdiction or power to proceed with a pending trial after the dissolution of the corporate plaintiff, in the absence of an application for substitution.

4. Whether argument, pleadings and other documents filed by counsel appearing in the name of a dissolved corporation may properly be received and filed as part of the record in the case.

5. Whether all proceedings conducted in the District Court after the dissolution of the plaintiff DSC were void for want of jurisdiction of a party plaintiff.

6. Whether the judgment entered by the District Court nine and one-half months after the dissolution of the DSC was void.

7. Whether the failure of the RFC to move that it be substituted in the particular action in the manner and within the time fixed by the Congressional mandate terminated its power to do so, thus causing the particular action to terminate for want of a party plaintiff.

ARGUMENT.

1. SUMMARY OF ARGUMENT.

Defense Supplies Corporation, plaintiff in the instant action, was a corporation created by and organized under an Act of Congress. It was given power to contract and to sue and be sued in its own name; it was not clothed with sovereign immunity, and its standing before this Court is that of an ordinary private corporation. During the trial of the action in the District Court, after the taking of testimony but prior to the submission of the cause and long prior to the entry of judgment, this corporation,

created by Act of Congress, was dissolved by Act of Congress on July 1, 1945.

The question involved here is as to the effect upon the then pending action of that dissolution of the corporate plaintiff.

It is fundamental that dissolution of a corporation abates a pending action to which it is a party, in the absence of statutory authority for the survival of the action. The only statute which made any provision for survival of the present action was the Joint Resolution of June 30, 1945, the statute which dissolved DSC while the action was pending. The joint resolution which dissolved the DSC transferred all functions, powers, duties and authority of the DSC to the RFC, together with all of its documents, records, assets and liabilities of every kind and nature. Having so transferred everything the DSC had to the RFC, the joint resolution then proceeded to dissolve the DSC. From July 1, 1945 the DSC, named as plaintiff in an action at law then on trial in the District Court was without functions, powers, duties or authority; had no documents, books, records, accounts, assets or liabilities of any kind or nature, and its naked corporate shell had been dissolved by an Act of Congress. It must therefore be clear that there was no such legal entity as the DSC before the Court at any time after July 1, 1945. There was at no time after that date a party plaintiff in the then pending litigation.

The Joint Resolution further provided that pending actions by and against DSC should not abate by

virtue of the passage of the Joint Resolution alone, but that the Court, upon the proper showing made within twelve months, might allow such actions to be maintained by or against RFC.

It is the position of respondents that under the terms of the Joint Resolution, no further action could properly be taken in the action then pending in the District Court until and after RFC, under the terms of that statute, upon proper motion made and granted within the time limited, was substituted as party plaintiff. Barring such action by RFC, the pending proceeding was suspended for lack of any party plaintiff, and the District Court was without any power or jurisdiction to proceed further with the action or to enter judgment therein. Only by strict compliance with the terms of the statute was RFC entitled to be substituted as party plaintiff, and only upon such substitution would the District Court have power or jurisdiction to proceed with the pending action and enter judgment therein. Under no other circumstances could the action survive.

Not only is this conclusion the only proper one under the terms of the statute, but it is reinforced by a series of decisions of this Court and the lower Federal Courts interpreting a statute *in pari materia*. It is fundamental that Congress, by using in a new statutory enactment language which has been interpreted by this Court in an earlier statute, thereby approves the interpretation placed upon that language and intends the same effect to be given to the new statute.

In the present case RFC, which alone could exercise any of the powers of the dissolved DSC and which alone had the duty of moving for substitution within the time limited, did nothing. Instead, counsel previously appearing for DSC, knowing of its dissolution (R. 398), continued to prosecute the then pending action, without at any time advising the Court that they appeared in the name of the dissolved and nonexistent plaintiff. Under the circumstances, the continued prosecution and the submission of the cause was a fraud upon the Court and the judgment entered by the District Court was an act done *in vacuo* and wholly beyond the jurisdiction of the Court. The judgment entered was void.

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2. DEFENSE SUPPLIES CORPORATION WAS A CORPORATION CREATED UNDER AN ACT OF CONGRESS AND WAS BY ACT OF CONGRESS DISSOLVED ON JULY 1, 1945.

Preliminarily, some discussion is essential as to the nature of Defense Supplies Corporation, plaintiff in the action below. Such discussion is necessary because of the assertions by petitioners (Brief. pp. 38-43) that the United States was the real plaintiff and that failure to substitute any party plaintiff upon the dissolution of DSC was a mere "defect in form".

In fact, however, DSC was admittedly a corporation, a corporation organized under an Act of Congress, granted power to contract and to hold property in its own name, to sue and be sued in its own name, and to exercise all of the powers of an ordinary corpo-

ration (R. pp. 4, 78). DSC here held property in its own name and sued in its own name for alleged damage to that property. While that suit was pending and before the cause had been submitted, DSC was dissolved by an Act of the Congress which created it, its functions, duties, powers, and assets and liabilities being transferred to RFC, with any pending actions by or against it being specifically dealt with in the statute which dissolved it.

The status of governmental or goverment owned corporations before the law is precisely that of privately owned corporations.

Bank of the United States v. Planters Bank, 9 Wheaton 904, 6 L. Ed. 244 (1824).

The sovereign immunity of the United States does not attach to a corporation created by the United States, regardless of the fact that the United States owns the stock of that corporation.

Sloan Shipyards Corp. v. U. S. Shipping Board E. F. Corp., 258 U.S. 549, 66 L. Ed. 762 (1922);

Keifer & Keifer v. R.F.C., 306 U.S. 381, 83 L. Ed. 784 (1939);

R.F.C. v. J. G. Menihan Corp., 312 U.S. 81, 85 L. Ed. 595 (1941).

In the latter case (*R.F.C. v. J. G. Menihan Corp.*) Mr. Chief Justice Hughes clearly indicates that a government owned corporation (there the RFC) acts in a proprietary capacity and not as the United States itself, being subject to the normal incidents of litigation and having none of the immunity of the

sovereign. It seems clear that DSC here is to be treated as an ordinary corporation, and that Congress has so regarded it.

In spite of this, petitioners seek to disregard the corporate entity of DSC, asserting that the United States was the real party plaintiff and that DSC was only a "nominal plaintiff." Not only does this contention require a holding by this Court that Congress, both in creating and in dissolving DSC (with specific directions as to the disposition of any pending suits), was performing futile and meaningless acts, but the authorities cited in support thereof do not support the contention. The bulk of the authorities relied upon are decisions of the lower Federal Courts regarding suits brought by the O.P.A. Administrator (see cases cited Pet.'s Brief pp. 40-41), holding that such suits are brought by the administrator on behalf of the United States. This proposition is hardly debatable, as the Act itself (Sec. 205 (e) of the Emergency Price Control Act as amended) provides that "the administrator may institute such action on behalf of the United States". The treatment by the lower Federal Courts of representative actions brought by an executive administrator under such a statute is hardly persuasive in determining the status of a corporation created and dissolved by Act of Congress. This is particularly true, since there is in fact a conflict among such cases with respect to substitutions (see: *Bowles v. Ohlhausen*, 71 Fed. Supp. 199 (D.C., N.D. Ill., E.D. 1947)) and such substitution has been deemed proper in the only case to reach this Court

(*Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U. S. 111, 91 L. Ed. 1375 (1947)).

The other cases cited by the petitioners are no more persuasive. In the case of *Cherry Cotton Mills v. United States*, 327 U. S. 536, 90 L. Ed. 835 (1946), the Court held in effect that where one government agency or corporation owed a debt to a citizen and the same citizen was indebted to another corporate agency, the right to set-off could be invoked by the government agency to whom the debt was owed. In the case of *Southern Pacific Co. v. R. F. C.*, 161 F. (2d) 56 (9th CCA, 1947), the Court merely held that the R.F.C. as a corporation owned by the Government of the United States was entitled to receive the benefit of reduced railroad rates applying to all shipments of goods owned by the Government of the United States. In the case of *Defense Supplies Corp. v. United States Lines Co.*, 148 F. (2d) 311 (2d CCA, 1945), the Court held that two corporations each owned by the Government of the United States could not sue one another under the terms of the Suits in Admiralty Act. None of these cases or the other cases cited with them in the petitioners' brief bears any relation to the question before this Court; that is to say, the question of the effect of the dissolution of a corporation owned by the United States where the congressional mandate dissolving that corporation has specifically provided, first, the agency that is to exercise such rights as were formerly held by the dissolved corporation, and then has specifically provided the time, manner and means with which such

rights must be exercised. There is no need in the present action to go beyond the statute itself for by the Joint Resolution the Congress specifically determined the time, manner and means with which the functions of the former corporation were to be exercised. The power of the Congress so to do must be undisputed.

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3. **DISSOLUTION OF A CORPORATION ABATES A PENDING ACTION IN THE ABSENCE OF STATUTORY AUTHORITY FOR ITS SURVIVAL.**

It cannot be disputed that DSC was dissolved by the Joint Resolution of June 30, 1945. Before proceeding to a discussion of the terms of the Joint Resolution itself, mention must be made of certain fundamental rules of law which have been disregarded by petitioners.

First, it is elementary that the dissolution of a corporate party abates pending actions to which it is a party in the absence of a statute providing authority for the survival of the actions.

National Bank v. Colby, 21 Wall. 609, 22 L. Ed. 687 (1874);

Oklahoma Natural Gas Co. v. Oklahoma, 273 U. S. 257, 71 L. Ed. 634 (1927);

Chicago T. & T. Co. v. 4136 Wilcox Bldg. Corp., 302 U.S. 120, 82 L. Ed. 147 (1937).

It is apparent that in the absence of some statutory authority for survival, the action pending in the District Court could not survive the dissolution of DSC.

Petitioners' only attack upon this basic rule is based upon a misconception of the facts. They argue (Brief pp. 34-38) that the dissolution of DSC did not render the judgment of the District Court void. This argument, however, is based upon the oftstated assumption (Petitioners' Brief pp. 9, 11, 13, 34, 38) that the dissolution of DSC was subsequent to the entry of judgment. This wholly erroneous assumption is not supported by the record; in fact, DSC was dissolved before the submission of the cause and nine and one-half months prior to the entry of judgment. The argument of petitioners, and the cases cited in support thereof, are simply not in point. Thus in *Walling v. Reuter,* 321 U.S. 671, 88 L.Ed. 1001 (1944), and *Mitchell v. Overman,* 103 U.S. 62, 26 L.Ed. 369 (1881), the cases principally relied upon by petitioners on this point, it is perfectly clear that judgment had been entered or the cause submitted long before the dissolution or death of a party. So too in the other cases cited by petitioners at page 37 of their brief. Here the action was pending at the time of the dissolution of DSC, and it necessarily abated in the absence of statutory authority for its continuance.

In this connection, we must also point out a distinction constantly ignored by petitioners, that is, the difference between a cause of action and a particular proceeding or action brought thereon. This fundamental difference is not only ignored by petitioners, but is one of the major errors in *Gaynor v. Metals Reserve,* 166 Fed. (2d) 1011 (8th CCA. 1948), the case principally relied upon by petitioners.

The distinction is clearly set out by this Court in *Fix v. Philadelphia Barge Co.*, 290 U. S. 530, 78 L. Ed. 481 (1934). While a cause of action may survive the dissolution of a corporation, a particular proceeding or action brought thereon abates upon that dissolution in the absence of statutory authority for the survival of that particular proceeding or action.

Thus here, the cause of action may well have survived the dissolution of DSC. Whether the particular action pending upon that cause of action survived or not depends upon whether there was specific statutory authority for survival of *that* action.

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4. **THE EFFECT OF THE JOINT RESOLUTION OF JUNE 30, 1945.**

A. The statutory language.

It will perhaps clarify the presentation of the argument on behalf of the respondents if we first state our view of the effect of the Joint Resolution of June 30, 1945, and then proceed to discuss the various arguments advanced on behalf of the petitioners in their brief.

The position of the respondents is stated in the opinion of the majority in the Court of Appeals and we believe that position to be sound and well taken. It is this: DSC was a corporate agency created by an Act of Congress (Act of January 22, 1932, Chapter VIII, 47 Stat. at Large p. 59). By that Act it was granted the capacity to sue and be sued; to own property and to perform other corporate functions. It

existed for the purposes stated in the Congressional enactment which created it and its corporate life was dependent upon the decision of that legislative body.

During the course of its corporate existence it brought an action against these respondents and that action proceeded to trial in the District Court. While that action was pending in the District Court, the Congress of the United States, by Joint Resolution of June 30, 1945, terminated the existence of the DSC. The power of the Congress to thus terminate the life of its creature is indisputable. The Congressional enactment consisted of two sections. By the terms of section 1 of the Joint Resolution, Congress transferred to the RFC all functions, powers, duties and authority of the DSC together with all its documents, records, assets and liabilities of every kind and nature. Had the Congress gone no further the DSC could have continued in existence but only as a naked corporate entity without powers, authority, assets or liabilities of any kind or nature. The language of the Act is so broad and so all-inclusive that it is perfectly clear that from the moment of its enactment the DSC was without power or right to perform any act. Obviously it could no longer sue or be sued; it could no longer employ counsel; it was purely a legal fiction existing only in the legal imagination—a bodyless legal creation. Everything that it had ever possessed, tangible or intangible, was by the terms of the Joint Resolution taken from it.

Having thus stripped its creature of every vestige of life, the Congress then proceeded to dissolve the

corporation itself. The language of the Act is clear, immediate and mandatory: "The designated corporations are hereby dissolved". Certainly in the language of the first section of the Joint Resolution there is no possible ambiguity and no possible need for interpretation of the Congressional intent. The corporations were destroyed as completely as though they had never existed.

Such then was the condition of the corporation, then a plaintiff before the District Court, after the passage of the Joint Resolution of June 30, 1945. The named plaintiff in that action was without assets or liabilities, functions, powers, duties or authority. It had no documents, books of account, records—none of the attributes of corporate existence. It could neither pay a judgment nor collect one; it had no officers, no employees—not even a name. To say that this nonexistent bodyless creature had the power or authority to continue the prosecution of a lawsuit is to state that a dead creature still lives. Yet for a period of nine and one-half months after every vestige of life had been stripped from the DSC, counsel appearing in its name continued the prosecution of an action at law in its name before the District Court and nine and one-half months after its dissolution that Court, not knowing of the dissolution, rendered a judgment in favor of this non existent plaintiff.

The petitioners have pointed out in their brief the fact that the Joint Resolution was prepared by counsel for the RFC and submitted to Congress for action. They have been careful to point out that when first

submitted the Resolution contained only that portion now designated as section 1. They have also pointed out that at least one member of Congress (Senator Taft) was of the opinion that the resolution as submitted was not sufficient and that, acting upon his suggestion, counsel for the RFC prepared and submitted to Congress the second section of the Joint Resolution and that thereupon the Resolution containing both sections 1 and 2 was passed by Congress. While the first section of the Act is broad and all-inclusive in its terms, the second section deals particularly and specifically with liabilities and with suits, actions and proceedings.

The Congress first dealt with the subject of liabilities of the DSC which had not yet ripened into suits, actions or other proceedings. It is clear from the first sentence of the second section that as to such causes of action, Congress intended that the RFC (and only the RFC), should have the power to sue or be sued. The second sentence of the second section dealt with suits, actions or other proceedings already commenced, and is definite and specific with respect to the disposition of such actions. Under the specific conditions therein stated "the court * * * may allow the same to be maintained by or against the Reconstruction Finance Corporation." No other government agency is mentioned. Congress has determined that the RFC (and only the RFC) shall be the government agency by or against which such actions may be maintained. Where the Congress has by specific mandate described in detail the government agency by or against which

certain actions may be maintained, the congressional intent to exclude the possibility of any other agency bringing or maintaining such actions is clear. This doctrine is so fundamental as to be the subject of a legal maxim "*Includio Unius est Exclusio Alterius*" —"the inclusion of one is the exclusion of the other; the certain designation of one person is the absolute exclusion of all others". (11 Coke 58 b).

This simple legal maxim has received the approval of this Court:

> "When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode."
>
> *Botany Mills v. United States*, 278 U.S. 282, 289, 73 L. Ed. 379, 385 (1929);
>
> *Raleigh & G. R. Co. v. Reid*, 13 Wall. 269, 270, 20 L. Ed. 570 (1872),

and of the Circuit Court of Appeals of the Ninth Circuit:

> *Paso Robles Mercantile Co. v. Com. Internal Revenue*, 33 Fed. (2d) 653 (9th CCA, 1929).

Petitioners in effect deny this fundamental doctrine by arguing in their brief that substitution was unnecessary since the United States was the real plaintiff in the action. We have discussed this contention above in another connection, but we wish to point out here that not only would petitioners' contention render the actions of Congress futile and meaningless, but it runs contrary to the practice of petitioner RFC both in this Court and the lower Federal Courts. Thus in *R.F.C. v. County of Beaver*, 328 U.S. 204, 90

L. Ed. 1172 (1946), while a case was pending in this Court, RFC successfully moved within the time limited in the Joint Resolution to be substituted as the appellant for one of the corporations named in the Joint Resolution. Similar practice is seen in *The Kongo,* 155 Fed. (2d) 492 (6th CCA, 1946) and *Atlantic Meat Co. v. R.F.C.*, 155 Fed. (2d) 533 (U.S. E.C.A., 1946), in the lower Federal Courts.

Petitioners thus assert that their own settled practice is unnecessary and also that Congress did a futile act in naming the agency privileged to continue pending litigation by or against the dissolved corporations.

The Congress determined that suits, actions and proceedings then pending could only be maintained thereafter by or against the RFC, and went still further in stating the specific method by which substitution might be permitted and the time within which such substitution could be accomplished.

> "No suit, action, or other proceeding lawfully commenced *by* or *against* any of such corporations shall abate by reason of the enactment of this joint resolution, *but* the court on motion or supplemental petition filed at any time within twelve months after the date of such enactment, showing a necessity for the survival of such suit, action, or other proceeding to obtain a determination of the questions involved, may allow the same to be maintained by or against the Reconstruction Finance Corporation." (Emphasis ours.)

Thus the person to be substituted and the time and manner are all prescribed and other persons or modes were negatived.

There was certainly no lack of power in the Congress to set forth the precise manner in which actions pending against a government owned corporation could be maintained, and statutes of repose are so common that certainly no claim could be made that the Congress did not have power to limit the time within which actions could be maintained by or against a government owned corporation.

The language of the second section seems to us perfectly clear and unambiguous and it seems unnecessary to invoke rules of judicial interpretation where the language itself makes the meaning manifest. Having first taken from the DSC every vestige of its corporate power or authority and every corporate function and then having destroyed the corporation itself, the Congress proceeded to determine what should be done with pending litigation. In section 1, it had transferred to the RFC all of the assets and liabilities of the DSC, and, therefore, in section 2, it granted to the RFC the right to cause itself to be substituted in then pending actions. That right, however, was circumscribed by the provision that it should be subject to prior approval of the Courts in which the actions were then pending and must be exercised within a twelve months period. Much is made in the brief filed on behalf of petitioners of the language in the second section of the Joint Resolution to the effect that "no suit shall abate by reason of the

enactment of the Joint Resolution". In the argument on behalf of petitioners, they state that, in view of this language, no substitution was necessary in order that pending actions might continue in being. No reference is made in petitioners' brief to the fact that actions at law cannot continue without adversary parties and that the existence of both plaintiff and defendant is a jurisdiction prerequisite.

> "In every action there must be a real plaintiff, and for standing as a party plaintiff it is necessary that plaintiff be a person in law." (47 C.J., Sec. 16, p. 18.)
>
> "* * * it is generally required that a person, in order to be properly qualified to be a party plaintiff, must be possessed of three essential elements or characteristics: (1) legal entity or existence, (2) legal capacity to sue, (3) remedial interest in the cause of action asserted." (Idem., Sec. 15, p. 18.)

From and after the moment of its dissolution on July 1, 1945, Defense Supplies had none of the essential elements of a plaintiff. It had no legal entity or existence, no legal capacity to sue, no remedial interest in the cause of action asserted.

After the death of the DSC, only the defendants were before the Court and unless and until substitution was made, no justiciable controversy existed in the District Court. The trial Court in ignorance of the lack of a proper party plaintiff entered judgment for that plaintiff nine and one-half months after it had ceased to have any existence. Thereafter the parties to the action, including the non-existent plain-

tiff, filed appeals and those appeals were heard by the Circuit Court of Appeals where, again, counsel appearing in the name of the DSC filed briefs and argued upon appeal. The Circuit Court of Appeals, in ignorance of the facts, confirmed the judgment of the District Court. Thereafter, in the course of preparation of a writ of certiorari, respondents discovered the Joint Resolution of July 30, 1945, and by motion brought the matter to the attention of the Circuit Court of Appeals. Thereafter, and for the first time, counsel appearing in the name of the defunct corporation, presented a "motion to amend pleadings and judgment" to correct what was therein described as a "defect in form" by substituting the name Reconstruction Finance Corporation for that of Defense Supplies Corporation wherever it appeared in the pleadings and judgment. It will be noted that at no time was a motion for substitution in the form or manner prescribed in the Joint Resolution ever filed in this action. The motion to correct the "defect in form" was denied and the Reconstruction Finance Corporation is not now, and never has been, a party to this action.

B. Judicial interpretation of the statute.

We believe the language of the Joint Resolution of June 30, 1945, to be so clear and unambiguous as to make it unnecessary to invoke rules of judicial interpretation. Petitioners, however, suggest to this Court certain canons of judicial interpretation with which we must take issue. While it is true that the legislative background of any statute may properly be con-

sidered by a Court in interpreting the language of that statute where patent ambiguity exists, such reference to the legislative background is wholly unnecessary and improper where the statute itself is clear and unambiguous. A statute is to be interpreted in the light of its language and not in the light of suggestions which may have merged in the final statute itself.

Petitioners, in contravention of these basic rules, put the cart before the horse, discussing first the legislative background of the Joint Resolution, and then suggesting that the statutory language, "even considered apart from its Congressional history", (Brief, p. 21) does not support the result reached by the Court of Appeals. They also suggest, in curious fashion, that since the Joint Resolution "was not a carefully drafted provision with other specific ends, it need not be read with the meticulous concern for harmonizing all its terms which is normally accorded legislative action" (Brief, p. 25).

Petitioners' suggestion that the Joint Resolution should not be read with meticulous concern is a rule of judicial interpretation without support either in statute or case law and requires no contravention here. We feel that the statute is clear and unambiguous, but that insofar as it is subject to interpretation, it should be read in accordance with the decisions interpreting a statute in *pari materia*. The Joint Resolution itself has been passed upon by the courts only in the case below and in the case of *Gaynor v. Metals Reserve Co.*, 166 F. (2d) 1011 (8th CCA, 1948); the *Gaynor* case

we will discuss further below, but it is submitted that the Court of Appeals for the Ninth Circuit in the decision below correctly interpreted the Joint Resolution, using proper rules of construction. The Court of Appeals carefully points out (R. 403-404) the parallel provisions of the statute of February 8, 1899 and the language adopted by Congress in the Joint Resolution of June 30, 1945, as follows:

"*No suit*, action or other proceeding lawfully commenced by or against any of such corporations *shall abate by reason of* the enactment of this joint resolution, *but the court, on motion or supplemental petition filed at any time within twelve months after the date of such enactment showing a necessity for the survival of such suit, * * * to obtain a determination of the questions involved, may allow the same to be maintained by or against* the Reconstruction Finance Corporation."

"That *no suit*, action, or other proceeding lawfully commenced by or against * * * officer of the United States * * * *shall abate by reason* of his death, or expiration of his term of office, * * * *but*, in such event, *the Court, on motion or supplemental petition filed, at any time within twelve months thereafter, showing a necessity for the survival thereof to obtain a settlement of the questions involved, may allow the same to be maintained by or against* his successor in office, and the Court may make such order as shall be equitable for the payment of costs."

In the instant act, the words "Reconstruction Finance Corporation" are substituted for the words "his successor in office". It is thus seen that Congress copied the words of its prior statute. The specific provisions of the 1945 act control those of the prior Federal Rules of Civil Procedure, rule 25(c), 28 U.S.C.A. following section 723c."

This Act of Congress of February 8, 1899, both in its original form and as amended by the Act of February 3, 1925 (28 U.S.C. Sec. 780), has been many times before this Court and before the lower Federal Courts. In all of these cases, the courts placed upon that statute an interpretation identical with that of the Court below.

LeCroue v. McAdoo, 253 U.S. 217, 64 L. Ed. 869 (1920);

John Barton Payne v. Industrial Board of Illinois, 258 U.S. 613, 66 L. Ed. 790 (1922);

U.S. ex rel. Claussen v. Curran, 276 U.S. 590, 72 L. Ed. 720 (1928);

Black Clawson Co. v. Robertson, 71 Fed. (2d) 536 (C.A.D.C., 1934);

Martin v. Coe, 83 Fed. (2d) 606 (U.S.C.A.D.C. 1936);

Kuttkoff v. Sutherland, 49 Fed. (2d) 944 (D.C. S.D.N.Y. 1931); affd. 66 Fed. (2d) 500 (2d C.C.A., 1933);

Becker Steel Co. of America v. Hicks, 1 Fed. Supp. 300 (D.C. S.D. N.Y., 1932); affd. 66 Fed. (2d) 497 (2d C.C.A., 1933);

Bowles v. Ohlhausen, 71 Fed. Supp. 199 (D.C. N.D., Ill., E.D., 1947).

It is a fundamental rule that when Congress reenacts a statute, the reenactment implies legislative approval of prior construction of the statute. In *Johnson v. Manhattan Railroad Company*, 289 U.S. 479, 500; 77 L. Ed. 1331, 1346 (1933) this Court said:

"In such circumstances, as this Court often has pointed out, reenactment operates as an implied legislative approval of the prior construction—in other words, as a reenactment of the statute as before construed."

See the following additional cases:

Old Colony R. Co. v. Commissioner of Internal Revenue, 284 U.S. 552, 76 L. Ed. 484 (1932);

McCaughn v. Hershey Chocolate Company, 283 U.S. 488, 75 L. Ed. 1183 (1931);

Heald v. District of Columbia, 254 U.S. 20, 65 L. Ed. 106 (1920).

and see a long series of cases cited in the footnote of *Heald v. District of Columbia*, 65 L. Ed. 106. Therefore, when Congress readopted the language used in the Act of 1899 following this Court's construction in the cases heretofore cited, that construction was approved and intended by Congress.

We may point out that even if this Court should follow the canon of construction suggested by petitioners, and consider the legislative background of the Joint Resolution, such consideration demonstrates only that the Congress believed that the first section of the Joint Resolution standing alone was incomplete, and further demonstrates that the resolution in its final form was prepared and submitted to Congress by the RFC, and that the counsel for the RFC copied the language of the Act of Congress of February 8, 1899 in preparing the Joint Resolution. It must be presumed that counsel for the RFC, as well as Congress, necessarily intended the language of the Joint Resolu-

tion to be given the same effect as had been given to the prior language by the long series of decisions cited above.

It is submitted that the interpretation placed upon the Joint Resolution by the Court of Appeals below not only is squarely in conformity with the language used therein but is the only proper interpretation which might be placed upon that Joint Resolution under any principle of interpretation. The statute is neither great in length nor are the words used therein ambiguous or uncertain in any sense. It sets forth a simple and precise Congressional mandate. The RFC failed to obey the Congressional mandate and cannot now be heard to say that it may with impunity disregard the Congressional mandate. Where the Congress passes a statute of repose, neither a present Federal officer nor his predecessor, nor the officers or directors or general counsel of a government owned corporation may with impunity disregard that statute.

C. The contentions of petitioners.

Petitioners charge error in the opinion of the Court of Appeals below, contending that the Court of Appeals incorrectly construed the meaning of the language of the Joint Resolution of June 30, 1945. To support their contention, they rely principally on the case of *Gaynor v. Metals Reserve Co.*, 166 F. (2d) 1011 (8th CCA, 1948) and upon the cases construing various state statutes. Obviously, the interpretation placed by courts upon state statutes of dissolution using entirely different language can be of little assistance in interpreting the statute with which we are presently

concerned. The decision in the *Gaynor* case, we believe, is wholly erroneous, being based, as are the contentions of the petitioners herein, upon certain fundamental errors.

As we have pointed out above, the Court of Appeals for the 8th Circuit in the *Gaynor* case and petitioners herein in their brief, both ignore the elementary distinction between a particular action or proceeding, and the right or cause of action upon which such a proceeding may have been brought. This distinction, which we have discussed above, is pointed out with great clarity in *Fix v. Philadelphia Barge Co.*, 290 U.S. 530, 78 L. Ed. 481 (1934), wherein the Court states:

> "Failure to comply with the statute forecloses the particular remedy therein provided; it does not destroy the right. There is a clear difference between the action and the *cause* of action." (290 U.S. 533).

That this distinction was ignored by the Court of Appeals for the 8th Circuit in the *Gaynor* case is shown where the Court states at page 1015:

> "To preserve a cause of action is to preserve the right to prosecute that cause of action to final judgment."

Standing alone, that statement is correct, but the Court goes further and incorrectly concludes therefrom that the preservation of the right to prosecute a cause of action to judgment includes the right to prosecute a particular proceeding brought thereon. In other words, that Court incorrectly assumed that if it

dismissed the action there pending, the plaintiff would thereby lose forever the right to bring another action thereon against the proper party. The Court there apparently based this misconception upon a South Dakota statute and ignored all reason and authority.

Further, it is apparent that petitioners herein and the Court of Appeals for the 8th Circuit rest their interpretation of the Joint Resolution of June 30, 1945, upon a portion only of that legislative enactment. They refer at length to that fragment of Section 2 of the Joint Resolution which provides:

> "* * * No suit, action, or other proceeding lawfully commenced by or against any of such corporations shall abate by reason of the enactment of this joint resolution * * *".

It is to be noted that this fragment of the Joint Resolution is nearly identical with the language in the Oklahoma statute referred to in *Oklahoma Natural Gas Co. v. Oklahoma*, 273 U. S. 257, 71 L. Ed. 634 (1927), which was construed therein to continue the life of a dissolved corporation for the purpose of pending litigation. Standing alone, that fragment would have permitted the continuance of the present action.

However, that fragment does not stand alone. The Joint Resolution continues:

> "* * * *But* the Court, on motion or supplemental petition filed at any time within twelve months after the date of such enactment, showing a necessity for the survival of such suit, action, or other proceeding to obtain a determination of

the questions involved, may allow the same to be maintained by or against the Reconstruction Finance Corporation." (Emphasis added.)

This portion of the sentence provides a specific procedure to be followed within a specific time if an action is to survive the dissolution of the named corporations. Petitioners and the Court of Appeals for the 8th Circuit in the *Gaynor* case refer to the fragment of the Joint Resolution upon which they rely as "mandatory" and to the balance of that section as "permissive". This view is wholly erroneous. The two portions of the section cannot be read separately but must be construed together, and as so read, it is obvious that substitution with in the time limited is in fact mandatory if the action is to survive, and permissive only in that the RFC within its own discretion may or may not choose the action to survive by taking the proper steps within the time limited. This construction is emphasized by the use of the word "*but*". If the section read that the action should not abate by reason of the enactment of the Joint Resolution "*and*" the Court on motion, etc., might allow substitution, then there might be merit in the argument advanced by petitioners and the Court of Appeals for the 8th Circuit in the *Gaynor* case. But the section provides that the action should not abate "by reason of the enactment of this joint resolution, *but* the court, on motion, etc." filed within twelve months, showing necessity for the survival of the action, "may allow the same to be maintained" by the Reconstruction Finance Corporation. Clearly, in the

absence of such motion within the period limited, the action will not survive.

Not only do petitioners and the Court of Appeals for the 8th Circuit in the *Gaynor* case ignore this portion of the Joint Resolution, but they neglect the language of command contained therein, which is relied upon by the Court of Appeals below (R. pp. 398-400). The first section of the Resolution directs that the duties, etc., of the dissolved corporations "*shall*" be performed by the Reconstruction Finance Corporation, and the second section directs that that corporation "*shall*" assume all liabilities, etc. In this case the Reconstruction Finance Corporation failed completely in its express duty as commanded by Congress, and it is that failure which prevented the survival of the action.

It is submitted that the decision of the Court of Appeals for the 8th Circuit in the *Gaynor* case is wholly erroneous, and that the contentions of petitioners based thereon are without merit.

CONCLUSION.

It is respectfully submitted that this Court should dismiss the Writ of Certiorari for lack of jurisdiction, for the reason that one of the named petitioners, Defense Supplies Corporation, has been dissolved and non existent for a period of over three and one-half years and the other named petitioner, Reconstruction Finance Corporation, is not now and never has been a party to this action, so that there is not now any

proper party petitioner before this Court; and for the further reason that the Writ of Certiorari was improvidently granted by this Court, since the time to petition for Writ of Certiorari had expired at the time the petition was filed.

It is further submitted that if this Court entertains jurisdiction of the cause, the judgment of the Court of Appeals for the Ninth Circuit should be affirmed; said judgment of the Court of Appeals for the Ninth Circuit was correct, since it vacated a judgment of the District Court which was void when entered for lack of jurisdiction and of a party plaintiff then before that Court.

Dated, San Francisco, California,
January 28, 1949.

Respectfully submitted,

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